No. 82-914

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

MONSANTO COMPANY,

Petitioner,

v.

SPRAY-RITE SERVICE CORPORATION,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF AMICUS CURIAE OF SERVICE MERCHANDISE COMPANY, INC. IN SUPPORT OF RESPONDENT

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This brief is filed with the consent of both parties on file with this Court.

INTEREST OF AMICUS CURIAE

Service Merchandise Company, Inc. ("SMC") on November 19, 1982, petitioned for a writ of certiorari in case No. 82-848. That petition is presently pending before the Court.

SMC is engaged in the showroom, catalog and mail order business selling name-brand products of national manufacturers such as Amana Refrigeration, Inc. ("Amana") from its 110 showrooms located in 25 states. Petition at 2. SMC's business of selling Amana microwave ovens

was destroyed pursuant to an agreeement and concert of action among Amana and its distributors and dealers to fix the wholesale and retail prices of the ovens and to boycott and refuse to sell such ovens to SMC. *Id.* at 2-3. Like respondent Spray-Rite here, SMC sued Amana alleging that such conduct constituted per se violations of Section 1 of the Sherman Act. *Id.*

The district court granted summary judgment dismissing SMC's per se claims and the Court of Appeals for the Sixth Circuit affirmed. The essential basis for both the dismissal and affirmance was that there was "insufficient evidence that a conspiracy or concerted action existed." *Id.* at 3-4. With concerted action removed, the court of appeals concluded that Amana's restraints involved only "non-price vertical restraints originating as unilateral action" which should be tested by the rule of reason standard pursuant to this Court's decision in *Continental T.V., Inc.* v. *GTE Sylvania, Inc.*, 433 U.S. 36 (1977). *Id.*

Both Amana and the courts below in SMC's case, and petitioner Monsanto and the United States as amicus curiae here, seek to shape these cases in the *Sylvania* mold by asserting that as a matter of law an inference of concerted action cannot flow merely from evidence that the manufacturer took action following the receipt of customer complaints. *See* Monsanto Br. at 18; Govt. Br. at 5-6. As Spray-Rite has demonstrated, such an assertion is a resounding irrelevancy because this case involves far more than such bare bones evidence; it involves direct evidence fully justifying a finding of concerted action by a properly instructed jury.[1] It is a matter of vital interest to

[1] Like Monsanto here, Amana did not urge in the SMC case (as the United States now does) that resale price maintenance should be removed from the per se category. Unlike the present case, however, the issues of per se price fixing and boycott liability were withheld

SMC that this Court not extend its decisions in *Sylvania* and *United States* v. *Colgate & Co.*, 250 U.S. 300 (1919) by imposing a more stringent burden of proof of concerted per se anticompetitive action than would ordinarily be required merely because the actors happen to be participants in a vertical chain of distribution.

ARGUMENT

We will burden neither the Court nor this brief with a repetition of the arguments made forcefully and artfully by respondent Spray-Rite. However, we do set forth the linchpin of petitioner Monsanto's no conspiracy argument at page 18 of its brief because it lays bare the hollow nature of Monsanto's position:

> The Seventh Circuit's conspiracy standard unreasonably allows a jury to find a price-fixing conspiracy based on speculation. It permits the inference of conspiracy from normal marketplace occurrences—price complaints, price concern and termination—that are fully consistent with independent action. Such evidence is probative of conspiracy only if other evidence reasonably supports the inference that *the manufacturer was acceding to the desires of complaining distributors* in terminating the plaintiff, rather than exercising its independent business judgment. (Emphasis supplied.)

It is axiomatic, of course, that Spray-Rite's burden of proof on the conspiracy issue was only one of adducing a preponderance of evidence, *i.e.*, it is more likely than not that there was a conspiracy. It is equally axiomatic that it is not the function of this Court to substitute its appraisal

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from the jury by the grant of summary judgment in the SMC case. We note that Monsanto does not contest the jury finding of group boycott made upon substantially the same kind and quality of evidence presented in the SMC case. *See* Petition at 5, 6, 12, 13, 20, 21.

of the facts for that of the trier of fact. *New Haven Inclusion Cases*, 399 U.S. 392, 435 (1970).

Monsanto itself has framed the conspiracy inquiry as being whether it terminated Spray-Rite in response to the desires of its complaining distributors rather than in the exercise of its independent business judgment. Monsanto thus views as paramount the motive and intent behind its challenged activities. This Court just recently in *Pullman-Standard, Inc.* v. *Swint*, 456 U.S. 273, 288 (1982) reaffirmed its holding in *United States* v. *Yellow Cab Co.*, 338 U.S. 338, 341 (1949) (an antitrust case) that " 'findings as to the design, motive and intent with which men act' [are] peculiarly factual issues for the trier of fact . . . ." Unfortunately for Monsanto, the jury resolved this factual issue against it by specifically finding that Monsanto terminated Spray-Rite pursuant to a conspiracy with one or more of its distributors. Monsanto's attempt to reshape this case into one involving nothing more than "normal marketplace occurrences—price complaints, price concern and termination" should be rejected.

Spray-Rite's brief recounts the manner in which Monsanto responded to the barrage of complaints about Spray-Rite's prices and demands for corrective action received from its distributors. The response included investigations, price surveillance, interrogation, threats of retaliation against Spray-Rite for its low prices and ultimate termination. This is not, as Monsanto contends, normal marketplace behavior consistent with independent action. Substituting herbicides for automobiles "[t]his process for achieving and enforcing the desired objective can by no stretch of the imagination be described as 'unilateral' or merely 'parallel'." *United States* v. *General Motors Corp.*, 384 U.S. 127, 144-145 (1966).

Should any doubt remain that in terminating Spray-Rite Monsanto "was acceding to the desires of complaining distributors" it is dispelled by Monsanto's contemporaneous behaviour. Informed of Monsanto's decision to terminate its distributorship, Spray-Rite met with Donald Fischer, Monsanto's product sales director, to ask that the decision be reconsidered. The first thing Fischer said on this occasion was that Monsanto had received many complaints about Spray-Rite's prices. (Tr. 767-768, 774, 1295.) Fischer had earlier personally made the decision to terminate Spray-Rite. (Tr. 3824, 3826.)

It is hardly surprising that jurors viewing the evidence as a unified whole would conclude that Fischer's utterance was tantamount to an admission that Monsanto was acceding to the desires of its complaining distributors rather than acting independently. Indeed, we suggest it would be surprising if the jurors, applying the same tests to this evidence as they apply in their own everyday dealings, had arrived at any other conclusion. In short, the jury finding of conspiracy was supported by substantial evidence.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 13th day of July, 1983, three copies of this Brief Amicus Curiae of Service Merchandise Company, Inc. were mailed, postage prepaid, to counsel of record for each party:

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